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No. 09-____

# Supreme Court of the United States

**COMMONWEALTH OF KENTUCKY,**
***Petitioner,***

*v.*

**MICHAEL BAKER,**
***Respondent.***

***On Petition for a Writ of Certiorari to the Supreme Court of Kentucky***

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

**Do the Kentucky residency restrictions for registered sex offenders violate the *ex post facto* prohibition when applied to registrants who committed their offenses requiring registration prior to the effective date of the statute but who resided in a prohibited area after the statute took effect?**

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## PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court in this case.

## OPINION BELOW

The Kentucky Supreme Court's opinion is reported as *Commonwealth v. Baker*, 295 S.W.3d 437, 2009 WL 3161371 (Ky. 2009). Petitioner's Appendix ("App.") 1a–32a.

## STATEMENT OF JURISDICTION

The Kentucky Supreme Court rendered the judgment from which relief is sought on October 1, 2009. App. at 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Kentucky Revised Statute 17.545*

Registrant prohibited from residing in certain areas; violations; exception

(1) No registrant, as defined in KRS 17.500, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility. The measurement shall be taken in a straight line from the nearest property line of the school to the nearest property line of the registrant's place of residence.

(2) For purposes of this section:

(a) The registrant shall have the duty to ascertain whether any property listed in subsection (1) of this section is within one thousand (1,000) feet of the registrant's residence; and

(b) If a new facility opens, the registrant shall be presumed to know and, within ninety (90) days, shall comply with this section.

(3) Any person who violates subsection (1) of this section shall be guilty of:

(a) A Class A misdemeanor for a first offense; and

(b) A Class D felony for the second and each subsequent offense.

(4) Any registrant residing within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility on July 12, 2006, shall move and comply with this section within ninety (90) days of July 12, 2006, and thereafter, shall be subject to the penalties set forth under subsection (3) of this section.

(5) This section does not apply to a youthful offender probated or paroled during his or her minority or while enrolled in an elementary or secondary education program.

*Article I, Section 10 of the United States Constitution*

**No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.**

## STATEMENT OF THE CASE

1. The Kentucky General Assembly first enacted a law placing residency restrictions on registered sex offenders during the 2000 Regular Session as part of Senate Bill 263. Codified as KRS 17.495, and effective April 11, 2000, the original restriction provided as follows:

> No registrant, as defined in KRS 17.500, who is placed on probation, parole, or other form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility. The measurement shall be taken in a straight line from the nearest wall of the school to the nearest wall of the registrant's place of residence.

In 2004, KRS 17.495 was amended by the General Assembly to specifically exempt youthful offenders from the residency restrictions.

During the 2006 Regular Session of the General Assembly, House Bill 3 was enacted which repealed KRS 17.495, amended the residency restriction statute, and reenacted it as a new section of KRS 17.500 to KRS 17.580. The current form of the statute, KRS 17.545, became effective on July 12, 2006.

2. On March 31, 1995, respondent entered a plea of guilty to a charge of third-degree rape in the Kenton County, Kentucky, Circuit Court, case number 94-CR-00427. App. 5a. As a result of his conviction, respondent was required to register as a sex offender

for a period of ten years pursuant to Kentucky Revised Statute (KRS) 17.520 . For reasons that are unclear in the record, respondent's period of registration is to expire on March 27, 2010. *Id.*

On February 2, 2007, respondent resided at 440 Merravay Drive in Elsmere, Kenton County, Kentucky. On that date, he was arrested and charged with being in violation of KRS 17.545 because his residence was located within 1,000 feet of East Covered Bridge Park. *Id.* Respondent subsequently moved the trial court to dismiss the charge on the basis that KRS 17.545 violated the following constitutional protections: 1) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; 2) Substantive Due Process as set forth in the Fifth Amendment to the United States Constitution; 3) The *Ex Post Facto* Clauses in Article 1, Section 10 of the United States Constitution and Section 19(1) of the Kentucky Constitution; and 4) The Inalienable Property Rights Provision as set forth in Section 1(5) of the Kentucky Constitution. *Id.*

On April 20, 2007, the trial court entered an opinion and order granting respondent's motion to dismiss on the basis that KRS 17.545 constituted an *ex post facto* punishment as applied to respondent whose triggering sex offender conviction pre-dated the effective date of the statute. App. 5a-6a. The trial court did not consider any of the other grounds raised in the motion to dismiss because they were mooted by its decision on the *ex post facto* claim. App. 6a.

The Commonwealth then moved the Kentucky Supreme Court for certification of the law, pursuant to Kentucky Rule of Civil Procedure (CR) 76.37(10), as to

whether KRS 17.545 constituted an *ex post facto* violation when applied to registered sex offenders who committed the offense requiring registration prior to July 12, 2006, the effective date of the statute. App. 6a. By a 5-2 vote, the Kentucky Supreme Court, applying the two-part test established by this Court in *Smith v. Doe*, 538 U.S. 84, 92 (2003), certified that the statute did violate the *ex post facto* prohibition under those circumstances. App. 19a.

The court first found the General Assembly had intended KRS 17.545's residency restriction to be a civil, nonpunitive, regulatory scheme. App. 10a. In reaching this conclusion, the court noted the General Assembly had not expressly stated its intent in enacting the statute, but its implied intent was nonpunitive based on the manner of the statute's codification and the fact that penalties for violating the statute only attached if the registrant failed to move. App. 9a-10a.

Applying the second part of the *Smith* test, however, the court found the residency restriction to be so punitive in effect as to negate the General Assembly's intent to create a civil regulatory scheme. App. 9a. In making this determination, the court considered the five factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), that this Court found relevant to its decision in *Smith*, 538 U.S. at 97. Those five factors "are whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Id.*; App. 11a. The

Kentucky Supreme Court found that all five of these factors weighed in favor of concluding KRS 17.545 was punitive in effect. App. 18a.

Specifically, the Kentucky Supreme Court found the residency restriction was "decidedly similar to banishment" and, thus, had traditionally been regarded as punishment in our history and traditions. App. 12a. The Kentucky Supreme Court also found the residency restriction promoted the traditional aims of punishment because the restrictions applied solely because prior convictions made a person a registered sex offender, App. 13a, and the residency restriction imposed an affirmative disability or restraint on registered sex offenders because it prohibited them from living within certain defined areas. App. 14a. Next, the Kentucky Supreme Court concluded that KRS 17.545 did not have a rational connection to the nonpunitive purpose of protecting public safety because the statute did not regulate any and all possible contact between registered sex offenders and children. App. 15a. Finally, the Kentucky Supreme Court found KRS 17.545 was excessive with respect to the nonpunitive purpose of protecting public safety because: 1) the statute applied to all registered sex offenders without an individualized assessment of whether a particular offender is a threat to public safety; and, 2) because of what the Kentucky Supreme Court said was "fluidity" in the residency restrictions. App. 16a-18a.

Two justices dissented from the court's decision that the retroactive application of the statute constituted an *ex post facto* violation. According to the dissent, the majority of the court had "with respect to a most difficult

social problem, arrogated to itself the role of legislator and ha[d] substituted its public policy judgment for that of the General Assembly." App. 19a. The dissent further stated that the majority had failed to properly defer to the General Assembly's intent in enacting the statute and had erroneously been too strict in applying the *Mendoza-Martinez* factors. App. 21a, 23a, 27a, and 31a.

## REASONS FOR GRANTING THE WRIT

This Court has never considered whether the retroactive application of a statute imposing a residency restriction on registered sex offenders constitutes punishment prohibited by the *ex post facto* clause. The framework for such a review, however, has been well established. *Smith*, 538 U.S. at 92. Under that framework, the Court must first ascertain whether the legislature intended for "'the statute to establish 'civil' proceedings.'" *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). If the legislature did intend to create a civil, nonpunitive, regulatory scheme, then that scheme must be examined to determine whether it is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* (quoting *Hendricks*, *supra*, at 361 (quoting *United States v. Ward*, 448 U.S. 242, 248-49)).

In examining the purpose and effect of the regulatory scheme, however, this Court has held that deference must be given to the legislature's intent to enact a civil, nonpunitive, regulatory scheme. *Id.* (citing *Hendricks*, *supra*, at 361). Further, "'only the clearest of proof' will suffice to override legislative

intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *Ward*, *supra*, at 249)). Most courts that have considered the issue have held that the retroactive application of a residency restriction statute to registered sex offenders does not constitute punishment prohibited by the *ex post facto* clause. By contrast, the Kentucky Supreme Court, following the lead of the Indiana Supreme Court in *Pollard v. State*, 908 N.E.2d 1145 (Ind. 2009), held that Kentucky's residency restriction statute was so punitive in its purpose and/or effect as to negate the Kentucky General Assembly's intent that the statute be part of a civil, nonpunitive, regulatory scheme. Certiorari should be granted to resolve this conflict among the courts and because the Kentucky Supreme Court has refused to follow this Court's directive in *Smith, supra*, that deference be given to the legislature's intent in the absence of the clearest proof of a punitive purpose or effect.

## A. THE KENTUCKY SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF OTHER STATE SUPREME COURTS AND A FEDERAL COURT OF APPEALS

The Kentucky Supreme Court recognized that its decision conflicted with the decisions of several state supreme courts, state courts of appeal, and a federal court of appeals which had upheld residency restriction statutes against *ex post facto* challenges. App. 6a, n. 2. However, it also noted that one state supreme court and a United States District Court had found the

retroactive application of such statutes did constitute ex post facto violations. Only this Court can establish a uniform rule on this constitutional issue.

In this case, the Kentucky Supreme Court determined that KRS 17.545, which prohibits registered sex offenders from residing within 1,000 feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility, constitutes a retroactive punishment in violation of the *ex post facto* clause when applied to registered sex offenders whose crimes were committed prior to the effective date of the statute constitutes a retroactive punishment in violation of the *ex post facto* clause. Applying the test set forth in *Smith, supra,* 538 U.S. at 92, the Kentucky Supreme Court concluded that, although the Kentucky General Assembly had intended KRS 17.545 to be a civil, non-punitive, regulatory scheme, App. 10a, the statute was so punitive in effect as to negate the legislature's intent. App. 18a. The Indiana Supreme Court and the United States District Court for the Northern District of Ohio have likewise held that the retroactive application of residency restriction statutes constitutes an *ex post facto* violation. *See Pollard, supra* (application of residency restriction statute to sex offender convicted prior to effective date of statute violates *ex post facto* clause contained in Indiana Constitution); *See also Mikaloff v. Walsh,* No. 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio 2007) (not reported in F.Supp.2d) (retroactive application of Ohio's residency restriction statute violates the ex post facto clause contained in the United States Constitution) In contrast to these two decisions, other state supreme courts and courts

of appeal, as well as a federal court of appeals, have reached the opposite conclusion.

The United States Court of Appeals for the Eighth Circuit has considered and rejected a claim that the retroactive application of a state sex offender residency restriction statute violates the ex post facto prohibition. In *Doe v. Miller,* 405 F.3d 700 (8th Cir. 2005), that court addressed such a challenge to Iowa's sex offender residency restriction statute, Iowa Code § 692A.2A. In considering the question, the Eighth Circuit applied the *Smith* framework and concluded that Iowa's statute was intended to be civil and was not so punitive in effect as to override the legislature's intent. The Eighth Circuit specifically concluded that the residency restriction was not the equivalent of banishment, and that the fairly recent origin of such restrictions suggested the restrictions did not involve a traditional means of punishing. *Id.* at 719-720. The Eighth Circuit recognized that a residency restriction statute does impose a disability or restraint on a sex offender subject to it. However, the Eighth Circuit concluded that the presence of a disability or restraint merely served to highlight the importance of the final two factors analyzed under *Smith*: whether the law was rationally related to a nonpunitive purpose and whether it was excessive in relation to that purpose. *Id.* at 721.

In analyzing these two factors, the Eighth Circuit noted that "[t]he requirement of a 'rational connection' is not demanding: [a] 'statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.'" *Id.* (quoting Smith, supra, at 103). The Eighth Circuit concluded the Iowa sex offender residency restriction statute

"no doubt" had a purpose other than punishing sex offenders, and that the legislature could reasonably conclude the statute would protect public safety. *Id.* The Eighth Circuit also concluded the statute was not excessive in relation to its nonpunitive purpose despite the fact the statute did not make an individualized risk assessment before it applied to a particular sex offender. The Eighth Circuit stated:

> The absence of a particularized risk assessment, however, does not necessarily convert a regulatory law into a punitive measure, for '[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.'

*Id.* (quoting *Smith*, *supra*, at 103).

The Eighth Circuit also stated that an argument that the legislature must tailor a residency restriction "to the individual circumstances of different sex offenders" was inconsistent with this Court's direction "that the 'excessiveness' prong of the *ex post facto* analysis does not require a 'close or perfect fit' between the legislature's nonpunitive purpose and the corresponding legislation." *Id.* at 722.

> In view of the higher-than-average risk of reoffense posed by convicted sex offenders, and the imprecision involved in predicting what measures will best prevent recidivism, we do not

> believe the Does have established that Iowa's decision to restrict all such offenders from residing near schools and child care facilities constitutes punishment despite the legislature's regulatory purpose.

*Id.* at 722.

The Iowa Supreme Court has also considered whether the retroactive application of Iowa Code § 692A.2A constituted an *ex post facto* violation in *State v. Seering*, 701 N.W.2d 655 (Iowa 2005). In considering the issue, the Iowa Supreme Court applied this Court's framework as set out in *Smith*. *Id.* at 666-669. The Iowa Supreme Court first concluded that the legislature had intended the statute to be nonpunitive. *Id.* at 667. The court then analyzed the effect of the statute under the *Mendoza-Martinez* factors utilized by this Court in *Smith*.

First, the Iowa Supreme Court determined that the residency restriction was "far removed from the traditional concept of banishment" because it only restricted sex offenders from residing in particular areas and left them "free to engage in most community activities." *Id.* at 667-668. The Iowa Supreme Court then acknowledged that the residency restriction statute might have some deterrent effect, but noted that many "governmental restrictions, especially those designed to protect the health and safety of children" have some deterrent effect without imposing punishment. *Id.* at 668. The Iowa Supreme Court also recognized that the residency restriction statute imposed a form of disability, but the nature of the disability was not absolute. *Id.* The statute did,

however, clearly have a rational connection to a nonpunitive purpose - the protection of society, and it was not excessive with respect to that purpose "considering the special needs of children in this particular area and the imprecise nature of protecting children from the risk that convicted sex offenders might reoffend." *Id.* After considering the factors set forth by this Court in *Smith,* the Iowa Supreme Court concluded the residency restriction statute was not so punitive in its effect as to impose criminal punishment. *Id.*

The Georgia Supreme Court likewise held that state's sex offender residency restriction statute, OCGA § 42-1-13, did not violate the ex post facto clause when applied retroactively. *Thompson v. State,* 603 S.E.2d 233 (Ga. 2004). Although the Georgia Supreme Court did not specifically apply the Smith framework in deciding the *ex post facto* claim, it still looked at whether the statute applied retrospectively, whether the statute was punitive or regulatory, and, if regulatory, whether the effect of the statute was punitive. *Id.* at 235 (citing *Weaver v. Graham,* 450 U.S. 24, 36 (1981); *United States v. Ursery,* 518 U.S. 267, 288-290 (1996); and *Akins v. Snow,* 922 F.2d 1558 (11th Cir. 1991)).

Applying this analysis, the Georgia Supreme Court determined that the state's sex offender residency restriction did not constitute an *ex post facto* violation because the statute did not apply retrospectively, i.e. the statute did not "alter[ ] the consequences for crimes committed prior to its enactment." *Id.* (citing *Miller v. Florida,* 482 U.S. 423, 430 (1987)). Rather, the residency restriction statute "simply declares that convicted sex offenders who currently reside within

certain well-defined areas are guilty of a felony. If a convicted offender violates the statute, he can be prosecuted (or have his probation revoked) for that current violation." *Id.* (citing *Hawker v. New York*, 170 U.S. 189 (1898) (new law criminalizing practice of medicine by convicted felon was not *ex post facto*)).

In *Lee v. State*, 895 So.2d 1038 (Ala.Crim.App. 2004), the Court of Criminal Appeals of Alabama considered whether the retroactive application of that state's sex offender residency restriction statute, § 15-20-26(a), Ala.Code 1975, constituted an *ex post facto* violation. Applying this Court's Smith test, the Alabama court held that the Alabama Legislature's intent in promulgating the statute was to create a civil, nonpunitive regulatory scheme and that the statute was not so punitive in its effect as to negate that intent. Specifically, the Alabama court found that there was no factual basis, much less "the clearest proof," in the record to support a finding, based on the five factors considered by this Court in *Smith*, "that the effects of the residency requirement . . . negate the Legislature's intention to protect the public, in particular children, from convicted sex offenders." *Id.* at 1044.

The Fifth District Appellate Court of Illinois followed suit by determining the retroactive application of that state's sex offender residency restriction statute, 720 ILCS 5/11-9.4(b-5), which prohibits a child sex offender from residing "within 500 feet of a playground or facility providing programs or services exclusively directed toward persons under 18 years of age," did not constitute an ex post facto violation. *People v. Leroy*, 828 N.E.2d 769 (Ill.App. 5 Dist. 2005). The Illinois court directly applied the Smith framework in deciding the

ex post *facto* claim and concluded the statute was not so punitive in effect as to negate the Illinois legislature's intent to create a civil regulatory scheme. *Id.* at 778-782.

Specifically, the Illinois court found that application of the five *Mendoza-Martinez* factors did not weigh in favor of concluding the effect of the residency restriction was punitive, even though the statute did impose some disability or restraint on those persons subject to it, and because it might deter future crimes. The Illinois court noted "that to hold that the mere presence of a deterrent purpose renders a statute criminal would severely undermine the government's ability to engage in effective regulation." *Id.* at 781 (citing *Smith*, 538 U.S. at 102) ("Any number of governmental programs might deter crime without imposing punishment."). Further, the Illinois court found that the imposition of a disability or restraint alone was insufficient to create a punitive effect. *Id.* See also, *People v. Morgan*, 881 N.E.2d 507 (Ill.App. 3 Dist. 2007) (retroactive application of 720 ILCS 5/11/9.3(b-5), which prohibits a child sex offender from residing "within 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend," does not constitute an *ex post facto* violation).

### B. The Kentucky Supreme Court Has Refused To Follow This Court's Directive In *Smith* That Deference Be Given To The Legislature's Intent In The Absence Of The Clearest Proof Of A Punitive Purpose Or Effect

Although all of the courts have agreed to a certain extent that residency restriction statutes might incidently promote a traditional aim of punishment and impose some degree of disability or restraint on the offender, the Kentucky Supreme Court veered from the holdings of the courts cited above in its analysis of the other three *Mendoza-Martinez* factors. Additionally, the Kentucky Supreme Court's decision conflicts with this Court's analysis of those factors in *Smith* in many ways. In doing so, the Kentucky Supreme Court has substituted its own policy judgment to override the intent of the Kentucky General Assembly despite the absence of any proof, much less the clearest proof, of a punitive purpose or effect. First, the Kentucky Supreme Court concluded the residency restriction was "decidedly similar to banishment," App. 12a, and that such restrictions, even though of recent origin, "have been regarded in our history and traditions as punishment." *Id.* However, because the residency restrictions contained in KRS 17.545 leave registrants free to visit, work, and participate in the community they are not a traditional form of punishment such as banishment which this Court has defined as "punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a specified period of time, or for life." *United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905). The recent origin of these

restrictions refutes that they "have been regarded in our history and traditions as punishment."

Second, the Kentucky Supreme Court found KRS 17.545 did not have a rational connection to the nonpunitive purpose of protecting public safety because the statute did not prohibit sex offenders from having any and all contact with children but rather only prohibited sex offenders from residing within certain prohibited areas. App. 15a. "It is difficult to see how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present." *Id.* (footnote omitted). The Kentucky Supreme Court, however, applied far too strict of a standard in determining that KRS 17.545 is not rationally connected to a valid non-punitive purpose.

As this Court has stated, a statute's "rational connection to a non-punitive purpose is a 'most significant' factor in our determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102 (citation omitted). However, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the non-punitive aims it seeks to advance." *Smith*, 538 U.S. at 103. The Kentucky Supreme Court acknowledged that the residency restrictions served the non-punitive purpose of public safety, but concluded the statute was not rationally connected to that purpose because the statute did not do everything possible to keep registered sex offenders from interacting with children. *Id.* In order for a civil, regulatory, statute to pass muster under such an analysis, the statute would have to be "perfect" in the

eyes of the court. This is not the correct standard for analyzing whether a statute "rationally serves" a valid non-punitive purpose. App. 17a.

Finally, the Kentucky Supreme Court also relied on the fact that KRS 17.545 lacks an individual risk assessment as support for its finding that the statute was excessive in relation to its nonpunitive purpose. None of the statutes considered in the cases cited above provided for an individual risk assessment of the sex offenders before they would be subject to the restriction, yet all of the statutes were found not to be excessive in relation to their nonpunitive purpose. In *Smith*, 538 U.S. at103, this Court explained that "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." This is precisely what the Kentucky General Assembly has done when it enacted KRS 17.545. There is nothing to support the conclusion that the legislature's "categorical judgment that conviction of specified crimes" requiring registration as a sex offender should entail a residency restriction as a consequence is unreasonable. "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Smith*, 538 U.S. at 104.

The Kentucky Supreme Court also concluded that the residency restriction in KRS 17.545 was excessive because the restricted areas could change as protected sites come and go. App. 18a. This conclusion is nothing more than speculation on the part of the Kentucky

Supreme Court, as the dissenting opinion points out. App. 30a. There is nothing in the record to suggest protected sites change with undue frequency. Without some evidence to demonstrate such "fluidity" places an undue burden on registered sex offenders, the Kentucky Supreme Court has merely replaced the Kentucky General Assembly's public policy determination with its own despite the deference courts are supposed to give to the legislature in making such determinations.

In the final analysis, the Kentucky Supreme Court has split from the holdings of other courts considering *ex post facto* claims to the retroactive application of sex offender residency restriction statutes. In doing so, as the dissent states, the Kentucky Supreme Court has "arrogated to itself the role of legislator and has substituted its public policy judgment for that of the General Assembly." App. 19a. The split of authority on the question presented in this matter, as well as the Kentucky Supreme Court's erroneous application of this Court's precedent, should be settled by this Court.

### C. The Question Presented In This Matter Is One Of National Importance Given The Prevalence Of Sex Offender Residency Restriction Laws

This Court has recognized that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith*, 538 U.S. at 103. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune v. Lile*, 536 U.S. 24, 33 (2002) (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27

(1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)). Other studies of sex offender recidivism indicate that rapists repeat their offenses at a rate up to 35 percent; offenders who molest young girls, at a rate up to 29 percent; and offenders who molest young boys, at a rate up to 40 percent. L.Song & R. Lieb, *Adult Sex Offender Recidivism: A Review of Studies*, 5-6 (Washington State Institute for Public Policy, Jan. 1994). Moreover, the recidivism rates do not appreciably decline over time, and thus, in contrast with other types of offenders, the tendency to reoffend does not appear to decline with an offender's increasing age. *Id.*

The management of sex offenders is among the principal topics facing legislatures across the nation. *See* Center for Sex Offender Management, *Legislative Trends in Sex Offender Management*, 2 (November 2008). In an attempt to protect the public and limit the temptation for such recidivism on the part of sex offenders, residency restriction statutes such as KRS 17.545 have become a prevalent part of the management scheme. As of 2008, well over half of the states, and many local jurisdictions, have enacted some type of sex offender residency restriction law. *Id.* Due to their prevalence, challenges to the retroactive application of these statutes under the *ex post facto* clause will be frequent and numerous. The division that has now emerged among the lower courts on this question leaves state legislatures uncertain as to whether they may employ this important measure to protect the public. Review of this issue by this Court is necessary to settle this uncertainty.

## CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to grant the petition for writ of certiorari.

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# APPENDIX

RENDERED OCTOBER 1, 2009
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SUPREME COURT OF KENTUCKY
2006–SC–000347–CL

COMMONWEALTH OF KENTUCKY APPELLANT

ON APPEAL FROM KENTON DISTRICT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
NOS. 07-M-00604

MICHAEL BAKER APPELLEE

**OPINION OF THE COURT**
**CERTIFYING THE LAW**

## I. INTRODUCTION

The question of law to be answered is whether KRS 17.545, which restricts where registered sex offenders may live, may be applied to those who committed their offenses prior to July 12, 2006, the effective date of the statute. We hold that it may not. Even though the General Assembly did not intend the statute to be punitive, the residency restrictions are so punitive in effect as to negate any intention to deem them civil. Therefore, the retroactive application of KRS 17.545 is an ex post facto punishment, which violates Article I, Section 10 of the United States Constitution, and Section 19(1) of the Kentucky Constitution.

## II. BACKGROUND

### A. Kentucky's Sex Offender Residency Restrictions

On July 29, 1994, seven-year-old Megan Kanka disappeared from her neighborhood in Hamilton Township, New Jersey. Soon after, police discovered that Megan had been raped and murdered by a man previously convicted of sex offenses. New Jersey enacted what became known as "Megan's Law," requiring sex offenders to register with the state, and establishing notification procedures for those living nearby. The same year, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, which conditioned certain law enforcement funding on states enacting their own version of Megan's Law.

Like every other state, Kentucky has enacted a version of Megan's Law. The General Assembly first enacted sex offender registration requirements in 1994, amending them in 1996 and again in 2000. The 2000 amendments to our Megan's Law also included residency restrictions on sex offenders as a condition of their probation or parole. That restriction, codified at KRS 17.495, read as follows:

> No registrant, as defined in KRS 17.500, who is placed on probation, parole, or other form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility. The measurement shall be taken in a straight line from the nearest wall of

the school to the nearest wall of the registrant's place of residence.

This Court upheld the registration provisions of Kentucky's Megan's Law in *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky.2002). The next year, the United States Supreme Court upheld Alaska's sex offender registration statute against an ex post facto challenge in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003).[1]

[1] Doe subsequently challenged the registration statute in state court on state law grounds, with the Alaska Supreme Court holding that the statute cannot be applied retroactively. *Doe v. State*, 189 P.3d 999 (Alaska 2008).

In 2006, the General Assembly enacted House Bill 3, which amended Kentucky's residency restrictions to their current form. 2006 Ky. Acts 182. The current residency restriction statute, effective July 12, 2006, codified at KRS 17.545, reads as follows:

(1) No registrant, as defined in KRS 17.500, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility. The measurement shall be taken in a straight line from the nearest property line of the school to the nearest property line of the registrant's place of residence.

(2) For purposes of this section:

(a) The registrant shall have the duty to ascertain whether any property listed in subsection (1) of this section is within one thousand (1,000) feet of the registrant's residence; and

(b) If a new facility opens, the registrant shall be presumed to know and, within ninety (90) days, shall comply with this section.

(3) Any person who violates subsection (1) of this section shall be guilty of:

(a) A Class A misdemeanor for a first offense; and

(b) A Class D felony for the second and each subsequent offense.

(4) Any registrant residing within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility on July 12, 2006, shall move and comply with this section within ninety (90) days of July 12, 2006, and thereafter, shall be subject to the penalties set forth under subsection (3) of this section.

(5) This section shall not apply to a youthful offender probated or paroled during his or her minority or while enrolled in an elementary or secondary education program.

While the original residency restriction statute applied only to those on probation, parole, or other form of supervised release, the current statute applies to all registrants regardless of probation or parole status. In addition, KRS 17.545 adds publicly owned playgrounds

to the list of prohibited areas, and measures the distance from the property line as opposed to the wall of a building. The statute also places the burden on the registrant to determine whether he is in compliance. Violation of the residency restriction is a Class A misdemeanor for the first offense, and a Class D felony for subsequent offenses.

**B. Procedural History**

On March 31, 1995, Respondent Michael Baker entered a guilty plea to a charge of third-degree rape in Kenton Circuit Court. In addition to Respondent's probated sentence of five years imprisonment, pursuant to the version of KRS 17.520 in effect at the time, Respondent was required to register as a sex offender until March 27, 2010.

Respondent subsequently lived in Reading, Ohio with his family. However, the City of Reading's sex offender residency restrictions forced Respondent to move back to Kentucky. On February 2, 2007, Respondent resided in Elsmere, Kentucky and was arrested and charged with violating KRS 17.545 for living within 1,000 feet of East Covered Bridge Park, allegedly a public playground.

According to Respondent, the Division of Probation and Parole provided him with a link to a website to determine whether he was in compliance with KRS 17.545. The website did not show East Covered Bridge Park and the surrounding area to be a prohibited zone.

In Kenton District Court, Respondent challenged KRS 17.545 on a number of constitutional grounds and moved to dismiss the charges against him. On April 20, 2007. the Kenton District Court granted Respondent's

motion and dismissed the charges.

The district court concluded that KRS 17.545, as applied to Respondent, violated the ex post facto clauses of the United States and Kentucky Constitutions. In its thorough opinion, the district court found that the General Assembly had intended KRS 17.545 to be punitive. The district court also found that, even if KRS 17.545 were not clearly punitive, its effect was punitive. Upon finding the statute to be unconstitutional as applied to Respondent, the district court declined to address the remaining constitutional challenges.

The Commonwealth then moved this Court for certification of law to determine whether KRS 17.545 is an ex post facto punishment. See Ky. Const. § 115, CR 76.37(10). We granted certification to resolve this important constitutional issue.[2]

[2] The Indiana Supreme Court recently held that, as applied to those who committed their crimes before the statute was enacted, Indiana's sex offender residency restriction statute constitutes retroactive punishment forbidden by the ex post facto clause of the state's constitution. *State v. Pollard*, 908 N.E.2d 1145 (Ind.2009).

*See also Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268 (N.D.Ohio Sept.4, 2007) (holding that retroactive application of Ohio's residency restriction statute violates the federal Ex Post Facto Clause). The *Mikaloff* appeal was dismissed at the State's request, presumably because the Ohio Supreme Court subsequently

prohibited retroactive application of the residency restriction statute on grounds that the Ohio legislature had not expressly made the law retroactive. *See Hyle v. Porter*, 117 Ohio St.3d 165, 882 N.E.2d 899 (2008).

*But see, e.g.*, *Doe v. Miller*, 405 F.3d 700 (8th Cir.2005); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *Thompson v. State*, 278 Ga. 394, 603 S.E.2d 233 (2004); *People v. Leroy*, 357 Ill.App.3d 530, 293 Ill.Dec. 459, 828 N.E.2d 769 (2005); *Lee v. State*, 895 So.2d 1038 (Ala.Crim.App.2004) (all upholding residency restriction statutes against ex post facto challenges).

## III. ANALYSIS

The United States Constitution and the Kentucky Constitution, through their respective ex post facto clauses,[3] prohibit the enactment of any law that imposes or increases the punishment for criminal acts committed prior to the law's enactment. The Ex Post Facto Clause of the United States Constitution "forbids ... the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' " *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26, 18 L.Ed. 356 (1866)).

[3] U.S. Const. Art. 1, § 10; KY. Const. § 19(1).

As a threshold question, for a law to be considered

ex post facto, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Hyatt*, 72 S.W.3d at 571 (quoting *Weaver*, 450 U.S. at 29, 101 S.Ct. 960). There is no question that KRS 17.545 applies to conduct by Respondent that occurred well before the law's enactment. In addition, Respondent is disadvantaged by the law, as it restricts where he may live. However, to violate the ex post facto clause, the statute must also be punitive. *Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky.2003) (citing *California Dept. of Corr. v. Morales*, 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)).

In determining whether, with regard to those like Respondent, KRS 17.545 constitutes retroactive punishment forbidden by the ex post facto clauses, we are guided by the United States Supreme Court's two-part test from *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). First, we must determine whether the legislature intended to establish a civil, nonpunitive, regulatory scheme, or whether the legislature intended to impose punishment. *Id.* at 92, 123 S.Ct. 1140 (citing *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). If the legislature intended to impose punishment, our inquiry ends. *Smith*, 538 U.S. at 92, 123 S.Ct. 1140. If, however, the legislature intended to enact a civil, nonpunitive, regulatory scheme, then we must determine "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.' " *Id.* (quoting *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072) (internal quotations and citations omitted).

**A. Whether the General Assembly Intended KRS 17.545 to be Punitive**

We must first determine whether the General Assembly intended to establish a civil, nonpunitive, regulatory scheme, or whether the legislature intended to impose punishment. In determining the legislature's intent, this Court "must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Smith*, 538 U.S. at 93, 123 S.Ct. 1140 (quoting *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997)). Therefore, we look to the General Assembly's expressed and implied intent. In determining the General Assembly's implied intent, we look to, as discussed in *Smith*, "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes." 538 U.S. at 94, 123 S.Ct. 1140.

We begin by examining the General Assembly's expressed intent in enacting KRS 17.545. The legislative history of House Bill 3 is extremely sparse. The bill was entitled "AN ACT related to sex offenses and the punishment thereof." 2006 Ky. Acts 182. This title suggests that the General Assembly intended KRS 17.545 to be punitive. However, while the title of an act may be used as an aid in statutory construction, *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 613 (Ky.2004), we do not believe that it should be determinative in this situation.

We therefore look to the General Assembly's implied intent in enacting KRS 17.545. First, we consider the manner of its codification. Kentucky's original sex

offender residency restrictions, which were codified at KRS 17.495, were part of the 2000 amendments to Kentucky's Megan's Law.[4] 2000 Ky. Acts 401. In *Hyatt v. Commonwealth*, this Court, addressing the sex offender registration portions of our Megan's Law (including the 2000 amendments), concluded that those statutes "are directly related to the nonpunitive goals of protecting the safety of the public." 72 S.W.3d at 572.

[4] KRS Chapter 17 is entitled "Public Safety."

Second, we look at the penalties established by KRS 17.545. Violation of residency restrictions is a crime: a Class A misdemeanor for the first offense and a class D felony for subsequent offenses. KRS 17.545(3). However, criminal liability attaches only if the offender fails to move. This is similar to the criminal liability under KRS 17.510(11) for failing to register as a sex offender, which we upheld in *Hyatt*, 72 S.W.3d at 573. *See also Smith*, 538 U.S. at 101-02, 123 S.Ct. 1140 ("A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense.").

We conclude that the General Assembly intended KRS 17.545 to be a civil, nonpunitive, regulatory scheme. Therefore, we now consider the second part of the Smith test.

**B. Whether MRS 17.545 is Punitive in Purpose or Effect**

Because we conclude that the General Assembly did

not intend KRS 17.545 to be punitive, we must now determine "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.'" *Smith*, 538 U.S. at 92, 123 S.Ct. 1140 (quoting *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072) (internal quotations and citations omitted). In making such a determination, courts are guided by seven factors originally discussed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). *Smith*, 538 U.S. at 97, 123 S.Ct. 1140.

As in *Smith*, the five factors relevant here are, "whether, in its necessary operation, the regulatory scheme" (1) has been regarded in our history and traditions as punishment, (2) promotes the traditional aims of punishment, (3) imposes an affirmative disability or restraint, (4) has a rational connection to a nonpunitive purpose, or (5) is excessive with respect to the nonpunitive purpose. *Id.*

**1. Historically Regarded as Punishment**

We first address whether the scheme established by KRS 17.545 has been regarded in our history and traditions as punishment. Traditionally, the colonial era practice of banishing an offender from the community has been regarded as a form of punishment. *Smith*, 538 U.S. at 98, 123 S.Ct. 1140. Banishment has been defined as "punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a specified period of time, or for life." *United States v. Ju Toy*, 198 U.S. 253, 269-70, 25 S.Ct. 644, 49 L.Ed. 1040 (1905).

As the district court noted, courts reviewing sex

offender residency restrictions have avoided or sidestepped the issue of whether these restrictions constitute banishment, and "dissenting judges have been far more intellectually honest concluding that residency restrictions constitute banishment." While KRS 17.545 is not identical to traditional banishment,[5] it does prevent the registrant from residing in large areas of the community. It also expels registrants from their own homes, even if their residency predated the statute or arrival of the school, daycare, or playground. Such restrictions strike this Court as decidedly similar to banishment. We therefore conclude that the residency restrictions in KRS 17.545 have been regarded in our history and traditions as punishment.

[5] It is, of course, not identical to traditional banishment, because the registrant may still return to the house during the day, when children are present, so long as he does not make the house his permanent home.

**2. Promotion of the Traditional Aims of Punishment**

Next, we address whether KRS 17.545 promotes the traditional aims of punishment: retribution and deterrence. *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554. KRS 17.545 promotes general deterrence through the threat of negative consequences, i.e. eviction or restriction of where a person may live in the future. More significant, however, is the statute's retributive effect.

KRS 17.545 makes no individualized determination of the dangerousness of a particular registrant. Even

those registrants whose victims were adults are prohibited from living near an area where children gather. When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones. In his concurring opinion in *Smith*, Justice Souter expressed his unease with the absence of individualized risk assessment:

> Ensuring public safety is, of course, a fundamental regulatory goal ... and this objective should be given serious weight in the analyses. But, at the same time, it would be naïve to look no further, given pervasive attitudes toward sex offenders.... The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

*Smith*, 538 U.S. at 108-09, 123 S.Ct. 1140 (Souter, J., concurring). By imposing restraints based solely upon prior offenses, KRS 17.545 promotes and furthers retribution against sex offenders for their past crimes. We therefore conclude that KRS 17.545 promotes the traditional aims of punishment.

**3. Affirmative Disability or Restraint**

Next, we address whether KRS 17.545 imposes an affirmative disability or restraint. We find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint. In *Hyatt*, this Court upheld registration requirements, noting that registration does "not place limitations on the activities of the offender...." 72 S.W.3d at 572 (citing *Collie v. State*, 710 So.2d 1000 (Fla.Ct.App.1998)). In *Smith*, the U.S. Supreme Court found it significant that "offenders subject to the Alaska [registration] statute are free to move where they wish and to live and work as other citizens, with no supervision." 538 U.S. at 101, 123 S.Ct. 1140.

By contrast, KRS 17.545 places significant limitations on where a registrant may live. With this limitation come significant collateral consequences. As the district court noted, the restrictions could, for example, "impact where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to drug and alcohol rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender."

The registrant also faces a constant threat of eviction "because there is no way for him or her to find a permanent home in that there are no guarantees a school or [other facility] ... will not open within 1,000 feet of any given location." *State v. Pollard*, 908 N.E.2d 1145 at 1150 (Ind.2009). As such, a registrant cannot establish a permanent home. KRS 17.545 clearly imposes affirmative disabilities and restraints upon registrants.

**4. Rational Connection to a Nonpunitive Purpose**

We next consider whether KRS 17.545 has a rational connection to a legitimate nonpunitive public purpose. The Commonwealth argues that residency restrictions serve the nonpunitive purpose of public safety, which is undoubtedly a legitimate purpose. The question is therefore whether KRS 17.545 bears a rational connection to public safety.

KRS 17.545 prohibits registrants from residing (i.e. sleeping at night, when children are not present) within 1,000 feet of areas where children congregate, but it does not prohibit registrants from spending all day at a school, daycare center, or playground (when children are present). It allows registered sex offenders to sit across the street and watch children, and even to work near children. KRS 17.545 does not even restrict an offender from living with the victim, so long as they live and sleep outside of the prohibited area. All KRS 17.545 prohibits is residing in a home within the prohibited zone. It does not regulate contact with children. It is difficult to see how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present.[6]

[6] These same questions were raised by the dissent in *People v. Leroy*, 357 Ill.App.3d 530, 293 Ill.Dec. 459, 828 N.E.2d 769, 793 (2005) (Kuehn, J., dissenting).

KRS 17.545 is connected to public safety. However, the statute's inherent flaws prevent that connection from being "rational." Therefore, we conclude that KRS

17.545 does not have a rational connection to a nonpunitive purpose.

**5. Excessive with Respect to a Nonpunitive Purpose**

Finally, we address whether KRS 17.545 is excessive with respect to the nonpunitive purpose of public safety. In making that determination, we note the lack of individualized risk assessment, combined with the statute's fluidity.

First, as noted previously, KRS 17.545 does not make any type of individualized assessment as to whether a particular offender is a threat to public safety. KRS 17.545 prohibits all registrants-regardless of whether the registrant's victim was an adult, teenager, or child, and regardless of whether the crime was violent, nonviolent, or statutory-from living within 1,000 feet of a school, playground, or daycare facility. There is absolutely no individual determination.

The Commonwealth correctly points out that a "statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 U.S. at 103, 123 S.Ct. 1140. In *Smith*, the U.S. Supreme Court concluded that individual assessment was not necessary for sex offender registration requirements, and that "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause." *Id.* at 104, 123 S.Ct. 1140.

In *Kansas v. Hendricks*, the U.S. Supreme Court upheld involuntary civil commitment of sex offenders

who had completed their period of incarceration. 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501. The Kansas law at issue required individual assessment of offenders prior to commitment. *Id.* at 352-53, 117 S.Ct. 2072. The *Smith* court noted that, while individual assessment is not required for sex offender registration, in *Hendricks*, "[t]he magnitude of the restraint made individual assessment appropriate." *Smith*, 538 U.S. at 104, 123 S.Ct. 1140.

The residency restrictions found in KRS 17.545 are more onerous than the registration requirements at issue in *Hyatt* and *Smith*, but less onerous than the involuntary commitment in *Hendricks*. We believe that the "magnitude of the restraint" involved in residency restrictions is sufficient for a lack of individual assessment to render the statute punitive.

The record before us does not reveal whether or not Respondent might be a threat to children and to public safety. But this is exactly why KRS 17.545 is excessive.[7] Given the drastic consequences of Kentucky's residency restrictions, and the fact that there is no individual determination of the threat a particular registrant poses to public safety, we can only conclude that KRS 17.545 is excessive with respect to the nonpunitive purpose of public safety.

[7] *See Pollard*, 908 N.E.2d at 1153 ("Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes.").

Second, as the district court stated, "[t]he excessiveness of Kentucky's residency restrictions is further heightened by their fluidity." While a sex offender may be permitted one day to live in a particular home, he may the next day find himself prohibited by the opening of a school, daycare facility, or playground. Perhaps even more troublesome is the fact that a city could easily designate an area a playground, and the statute provides no guidance as to what exactly qualifies as a "playground."

While such fluidity may provide little problem for registrants in rural areas of Kentucky, it should be easy to see why this becomes a serious burden in areas such as Louisville, Lexington, or Respondent's home of Northern Kentucky, with its dozens of tightly clustered municipalities. Furthermore, the statute places the sole burden on the registrant in determining whether or not he is in compliance. KRS 17.545(2). This fluidity and uncertainty makes KRS 17.545 excessive with respect to the purpose of public safety.

Of the five *Smith* factors, all five weigh in favor of concluding that KRS 17.545 is punitive in effect. Therefore, we conclude that KRS 17.545 is so punitive in effect as to negate the General Assembly's intention to deem it civil.

## IV. CONCLUSION

Although the General Assembly did not intend KRS 17.545 to be punitive, the residency restrictions are so punitive in effect as to negate any intention to deem them civil. Therefore, the statute may not constitutionally be applied to those like Respondent, who committed their crimes prior to July 12, 2006, the

effective date of the statute. To do so violates the ex post facto clauses of the United States and Kentucky constitutions. The law is so certified.

CUNNINGHAM, NOBLE, SCHROEDER, SCOTT, and VENTERS, J.J., concur. ABRAMSON, J., dissents by separate opinion in which MINTON, C.J., joins.

ABRAMSON, JUSTICE, DISSENTING:

Virtually alone among appellate courts to consider the issue, the majority has invalidated the retroactive application of legislation forbidding convicted sex offenders from residing near the schools, day care centers, and playgrounds where potential child victims congregate. In so doing the majority has, with respect to a most difficult social problem, arrogated to itself the role of legislator and has substituted its public policy judgment for that of the General Assembly. Because our democratic system leaves such policy choices to the legislature, and because I agree with the several other courts that have held that retroactive sex offender residency restrictions do not exceed legislative authority to address vital public safety concerns, I respectfully dissent.

## RELEVANT FACTS

As the majority notes, since 1994, when it adopted Kentucky's initial version of Megan's Law, the General Assembly has engaged in an evolving effort to address the profoundly serious and vexing problem of sex offenders, particularly those who offend against children. As part of this effort, Megan's Law, or the Sex Offender Registration Act, KRS 17.500 to 17.540,

requires convicted sex offenders and offenders against minors to register their addresses with the local probation and parole office. In 2000, the General Assembly sought further to protect potential child victims by forbidding registrants during the course of their probation or parole from residing within 1,000 feet of day care centers and elementary, middle, and high schools. In 2006, the General Assembly again expanded its protective efforts by enacting House Bill 3, the legislation at issue here, which, inter alia, extends the previously enacted residential restrictions. The amended restrictions, currently codified at KRS 17.545, apply to all registrants, not just to probationers and parolees, and add public playgrounds to the list of protected sites.

Michael Baker, who was convicted in 1994 of third-degree rape and so came under KRS 17.510's registration requirement, was living within 1,000 feet of a public playground in Elsmere, Kentucky, when he was notified that he was in violation of the amended residency restrictions. In February 2007 he was charged in Kenton District Court with a class A misdemeanor. Baker challenged KRS 17.545 as violative of the federal and state Ex Post Facto Clauses, constitutional provisions that forbid the state from either punishing or increasing punishment retroactively. By Order entered April 20, 2007, the district court agreed with Baker and declared the statute's retroactive application invalid. Pursuant to Section 115 of our Constitution and CR 76.37(10), the Commonwealth then moved this Court for a certification of law on the following issue: "Whether KRS 17.545 was enacted with the intent to punish sex

offenders or is so consequentially excessive as to negate any inferred contrary intent to regulate sex offender recidivism."

## ANALYSIS

Resolution of this case, as the majority notes, requires consideration of the two-part test the United States Supreme Court has applied to ex post facto issues in such cases as *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (upholding the retroactive application of a Kansas statute providing for the civil commitment of dangerous sex offenders) and *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (upholding the retroactive application of Alaska's version of the Sex Offender Registration Act). Under that test, a statute may be deemed punitive, and thus subject to the Ex Post Facto Clause's prohibition against retroactive punishment, if the legislature evidenced a punitive intent, or, even where the legislature intended a civil, non-punitive, regulatory statute, if "the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Smith*, 538 U.S. at 92, 123 S.Ct. 1140 (citations and internal quotation marks omitted). Because courts generally defer to legislative intent, however, " only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 92, 123 S.Ct. 1140 (emphasis supplied, citations and internal quotation marks omitted). The transformation the majority has worked in this case is contrary to this deferential standard.

**I. The General Assembly Intended KRS 17.545 To Be Civil Rather Than Punitive.**

The majority correctly concedes that the General Assembly intended KRS 17.545's residence restrictions to serve a regulatory, non-punitive, public safety function. Indeed, the residence restrictions have been codified in the "Public Safety" Chapter of the Kentucky Revised Statutes, Chapter 17, immediately following the Sex Offender Registration Act, an Act held to be non-punitive and thus not subject to the Ex Post Facto Clause, in *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky.2002). Nevertheless, the majority concludes that KRS 17.545's residence restrictions are so punitive in effect as to belie the General Assembly's apparently regulatory intent and to render KRS 17.545 inapplicable to the many registered sex offenders whose crimes were committed prior to the statute's effective date of July 12, 2006. This ruling obviously deals a severe blow to the statute's effectiveness and reflects, in my judgment, this Court's failure to give due deference to the General Assembly's contrary intent.

**II. The Effect of KRS 17.545 Is Not So Punitive As To Negate the General Assembly's Intention.**

As the majority correctly notes, in assessing the punitive effect of legislation intended to be merely regulatory, the United States Supreme Court has considered the following factors: "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive

with respect to this purpose." *Smith*, 538 U.S. at 97, 123 S.Ct. 1140. Several appellate courts have addressed the retroactive application of sex offender residency restrictions in light of these factors, and all but one of them have held that the restrictions, some far more severe than Kentucky's 1,000 foot buffer zone, were primarily regulatory, not punitive, and thus did not implicate ex post facto limitations. *Doe v. Miller*, 405 F.3d 700 (8th Cir.2005) (Iowa's 2,000 foot, buffer zone regulatory, not punitive); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005) (upholding 2,000 foot buffer zone); *Salter v. State*, 971 So.2d 31 (Ala.Civ.App.2007) (approving 2,000 foot buffer zone); *People v. Leroy*, 357 Ill.App.3d 530, 293 Ill.Dec. 459, 828 N.E.2d 769 (2005) (approving 500 foot buffer zone). *See also Standley v. Town of Woodfin*, 186 N.C.App. 134, 650 S.E.2d 618 (2007) (upholding ban on entering public park); *Doe v. Baker*, 2006 WL 905368 (N.D.Ga.2006) (upholding 1,000 foot buffer zone). *See generally Marjorie A. Shields*, "Validity of Statutes Imposing Residency Restrictions on Registered Sex Offenders," 25 ALR 6th 227 (2007). *But see State v. Pollard*, 908 N.E.2d 1145 (Ind.2009) (residence restriction deemed punitive in large part because it applies without a particularized assessment of dangerousness). As these courts have noted, residence restrictions are not a traditional form of punishment and their punitive effects are not undue in light of their important public safety objective. In my view, the majority's application of the Supreme Court's factors fails at several points to defer, as we are obliged to do, to permissible legislative judgments, and amounts thus to judicial legislating under the guise of constitutional analysis.

**A. Residence Restrictions Are Not, and Do Not Resemble, Traditional Forms of Punishment.**

Contrary to the majority's assertion, for example, KRS 17.545's residence restriction does not resemble banishment in either purpose or effect. Banishment, of course, was a means of removing dangerous individuals from the community in days when prisons did not exist or were inadequate to serve that purpose. KRS 17.545, by contrast, leaves registered sex and child offenders completely free to live, work, and participate in the community. It seeks only to lessen the contact, and hence the opportunity for tragedy, between known sex offenders and some of the community's most vulnerable members. The statute's potential requirement that a registered sex offender change residence is not unlike a zoning change with a like effect, a far cry from banishment or any other traditional form of punishment.

In other cases it has been argued that the buffer zones around protected sites left little or no residential opportunities available to registrants, and thus did tend to force registrants outside the community. We have not been referred to any similar showing in the record before us, however, and the buffer zones under Kentucky's statute are smaller than those at issue in most of those other cases. Even in those cases, the courts have held that because the residence restrictions left registrants free to visit, work, and otherwise conduct their affairs throughout the community, they did not resemble banishment in any but a superficial sense. *See, e.g. Doe v. Miller*, *supra*. The record here suggests only that Baker has been inconvenienced by being forced to move.[8] The majority's claims

notwithstanding, he has not been banished.

[8] Baker's counsel notes that he moved to Kentucky shortly before the charges were filed when residency restrictions in Reading, Ohio, prohibited him from residing in his former residence there.

**B. Although KRS 17.545 Imposes A Burden, That Burden Is Not Retributive.**

Baker has been burdened, however. There is no doubt but that residence restrictions are a form of disability. That fact alone, however, does not render KRS 17.545 punitive. The vast majority of civil regulatory statutes impose some sort of disability or restraint. The questions, rather, are whether the disability here serves punitive ends and whether it is so excessive with regard to the civil ends it is meant to serve as not to be rational. The majority maintains that KRS 17.545 is both punitive and irrational.

It is punitive, the majority contends, because it applies only to convicted sex offenders. Because the regulation is based on a prior offense, the majority concludes that it amounts to additional retribution for that offense. As the United States Court of Appeals for the Eighth Circuit in *Doe v. Miller* explained, however, residence restrictions single out prior offenders not because their past conduct is to be further punished, but because that conduct is an indicator of future dangerousness, which the legislature hopes to mitigate. The regulation looks not to the past crime, but to the danger of future recidivism.

The majority contends that that forward looking

focus is belied by the fact that the regulation does not attempt to distinguish the more from the less dangerous offenders, but the record before us provides no basis for that distinction. As the United States Supreme Court noted six years ago in *Smith v. Doe*, there is data suggesting that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.' " 538 U.S. at 103, 123 S.Ct. 1140. It may well be, of course, that as more data is gathered important differences among different types of offenders will emerge, differences which could have a bearing on legislative choices. That, however, is precisely the sort of information law makers, not courts, are designed to assess. There is nothing in the record before us which would preclude the General Assembly from treating sex offenders as a class, or would compel it to make the distinctions the majority favors. Neither Baker nor the majority, in sum, has shown that KRS 17.545 is a retributive statute, and most assuredly they have not shown retribution by the "clearest proof."

**C. KRS 17.545 Reasonably Advances A Vital Public Safety Aim.**

The final questions, then, are whether KRS 17.545 rationally serves a valid non-punitive purpose, and whether the disabilities it creates are excessive in light of that purpose. As our sister courts have held, residence restrictions have the vital, non-punitive purpose of protecting children from sexual assaults and other crimes. In *Smith, supra*, the Supreme Court noted that a statute's "rational connection to a nonpunitive purpose is a 'most significant' factor in our determination that the statute's effects are not

punitive." 538 U.S. at 102, 123 S.Ct. 1140 (citation omitted). The majority acknowledges, as it must, the General Assembly's legitimate, regulatory concern with public safety, but opines that KRS 17.545 is an irrational means to serve the public safety end because it does not solve the recidivism problem by eliminating any and all opportunities for a sex offender to reoffend.

The majority has applied far too strict a standard. The General Assembly is not obligated to fashion perfect statutes, *Cornelison v. Commonwealth*, 52 S.W.3d 570 (Ky.2001), nor is it precluded from addressing part of a problem and leaving other parts for another day. *Holbrook v. Lexmark International Group, Inc.*, 65 S.W.3d 908 (Ky.2001). As the United States Supreme Court stated in *Smith*, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." 538 U.S. at 103, 123 S.Ct. 1140. As in *Smith*, the imprecision the majority relies upon "does not suggest that [KRS 17.545]'s nonpunitive purpose is a sham or mere pretext." *Id.* at 103, 123 S.Ct. 1140 (citation and internal quotation marks omitted). On the contrary, while residential restrictions cannot eliminate all contacts between potential recidivists and their potential child victims, particularly where perpetrator and victim are related, they are clearly a rational means of decreasing those contacts, and thus the General Assembly could reasonably believe that they would enhance the overall safety of children. In denying the reasonableness of that belief, the majority disregards the General Assembly's right to address problems in part, rather than comprehensively, and improperly substitutes its policy judgment for that of

the General Assembly.

**D. The Disability KRS 17.545 Imposes Is Not Excessive In Light Of Its Vital Purpose.**

Under *Smith*, even if a regulation rationally serves a non-punitive purpose, it may still be deemed punitive if the disability or restraint it imposes is excessive with respect to that purpose. The majority characterizes KRS 17.545's disability-its potential requirement that registrants move away from protected buffer zones-as "drastic," and deems that disability excessive for a couple of reasons. The disability is excessive first, according to the majority, because it applies to all registrants without an individualized assessment of future dangerousness. It. is also excessive, the majority opines, because it is "fluid," i.e., because the protected buffer zones can change as schools, day care centers, and playgrounds open or relocate.

As the majority acknowledges, the Supreme Court rejected the first argument in *Smith v. Doe*. Upholding the retroactive application of Alaska's Sex Offender Registration Act against that very argument, the Court explained that

> [t]he *Ex Post Facto Clause* does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. We have upheld against ex post facto challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. See *De Veau*, 363 U.S. at 160, 80 S.Ct. 1146 ...

> *Hawker*, 170 U.S. at 197, 18 S.Ct. 573.... As stated in *Hawker*: "Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application...." *Ibid.* The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause.

*Smith v. Doe*, 538 U.S at 103-04, 123 S.Ct. 1140.

The majority seeks to distinguish Smith by noting that KRS 17.545 imposes a more onerous burden than the mandatory registration at issue in that case. It cites *Kansas v. Hendricks*, *supra*, in which the Supreme Court upheld the retroactive-application of a Kansas statute providing for the civil commitment of dangerous sex offenders. That statute passed constitutional muster, the Court explained, in part because the statutory scheme included individualized assessments of dangerousness. The majority asserts that the residence restrictions at issue here are more like civil commitment than mandatory registration, and that without individualized assessments of dangerousness those restrictions are excessive.

The flaw here is that residence restrictions are even less like civil commitment than they are like banishment. Registrants are not being confined against their wills, they are merely being told not to reside in certain areas and at worst to move from where they

already reside. The majority characterizes this imposition as "drastic," but in fact, having to move, whether as a result of eviction, foreclosure, eminent domain, or zoning change, is a common legal consequence and does not serve to render the underlying laws punitive. Far from being involuntarily confined, Baker has at most been significantly inconvenienced, and, in light of the fact that convicted sex offenders are more likely to offend against children than the general population, our sister courts have found this inconvenience not such as to remove residence restrictions such as KRS 17.545 from the legislature's authority to "legislate with respect to convicted sex offenders as a class." *Smith*, 538 U.S. at 104, 123 S.Ct. 1140. *Doe v. Miller, supra.*

The majority also finds the regulatory effect of KRS 17.545 excessive because the restricted areas can change as protected sites come and go. We have not been referred to anything in the record, however, suggesting that protected sites change with undue frequency or that Baker has been subjected to such changes. Absent that record, the majority's speculation on this point amounts again to nothing but its usurpation of the General Assembly's public policy prerogative.

## CONCLUSION

In sum, I strongly disagree with the majority's conclusion that KRS 17.545 is a punitive statute subject to ex post facto limitations. The statute does not impose a traditional punishment; it is forward looking, not

retributive; it rationally serves the vital public safety function of reducing contacts between potential child victims and potential sex offense recidivists; and it does so without imposing disproportionate civil disabilities. I find the majority's strained analysis to the contrary unconvincing, and I am dismayed both by its disregard of the nearly unanimous precedent upholding the retroactive application of similar legislation in other states and by its invasion of the General Assembly's sphere of expertise and authority. Accordingly, I respectfully dissent.

Minton, C.J., joins.

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